

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

577

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,722

United States of America, Appellee

v.

Charles Robinson, Appellant

On Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 19 1969

Nathan J. Paulson
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May 19, 1969

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court committed reversible error in failing to grant defendant Robinson's Motion for Relief from Prejudicial Joinder, either prior to trial, or when it became apparent during the course of trial that defendant Robinson was prejudiced by the inconsistent alibi testimony of his co-defendant Wilson.
2. Whether the trial and conviction of defendant Robinson on a purported "indictment" signed only by the foreman of the Grand Jury was beyond the jurisdiction of the District Court so that the conviction must be reversed.

The pending case has not previously been before this Court.

STATEMENT OF THE CASE

This is an appeal from a conviction for robbery, assault with a dangerous weapon, assault on a member of the police force, unauthorized use of a vehicle and carrying a dangerous weapon pursuant to Title 22, District of Columbia Code, §§ 2901, 502, 505(a), 2204, and 3204.

Charles H. Robinson, appellant in No. 22722, was arrested together with Charles Wilson, Jr., appellant in No. 22721, and Maurice Winslow on November 30, 1967. Testimony by a single police officer, William E. Manning, concerning the charges against them was presented to the Grand Jury on January 2, 1968. This testimony (cited herein as "Grand Jury Tr. ____") consisted of a largely hearsay description of a "holdup" at a Peoples Drug Store in Northeast Washington, an automobile chase involving a reportedly stolen car, a resulting accident, the apprehension of the three suspects, including a struggle between Robinson, who was said to have carried a pistol, and another officer, Cook, and the recovery of money and weapons from the car. No details were given the Grand Jury as to the amount of money stolen or from whom it was stolen, or as to events during the "holdup" itself.

Robinson and the others were indicted on January 22, 1968, in a seventeen-count indictment signed only by the Grand Jury

foreman and not by individual members of the Grand Jury.^{*/} The indictment contained six separate robbery counts, each detailing a separate robbery of a specified amount of money or property from a specific individual on the night of November 30, 1967. There were also eight separate counts of ADW in addition to the ADW count relating to Officer Cook, a UUV count and a CDW count against Robinson only.

On February 21, 1968, Robinson filed a motion for relief from prejudicial joinder. This motion was denied on March 8, 1968, by John J. Sirica, Presiding Judge, Criminal Court, U. S. District Court for the District of Columbia.

Robinson was thereafter tried together with defendants Winslow and Wilson, on October 21-24, 1968, before Judge Aubrey E. Robinson, Jr. on their pleas of not guilty.

On October 22, 1968, in the course of the trial, the Court dismissed the sixth count of the indictment with respect to all three defendants and the sixteenth count of the indictment as to defendants Winslow and Wilson.

On October 24, 1968, the Jury returned a verdict of guilty on all sixteen counts remaining against Robinson and verdicts of guilty on all fourteen counts charged against defendants Winslow and Wilson. Robinson was thereafter sentenced to two to ten years

^{*/} Count 17, carrying a deadly weapon in violation of 22 D.C. Code §3204, applied only to Robinson. All other counts applied to all defendants.

on each of the robbery and ADW counts, one to three years for UUV and one year for CDW, all sentences to run concurrently. His Motion For Leave To Appeal In Forma Pauperis was granted December 19, 1968.

The evidence and testimony relevant to this appeal which were presented at the trial are as follows:

On November 30, 1967, at approximately 10:00 p.m., the Peoples Drug Store at 2066 Rhode Island Avenue, N.E., Washington, was robbed at gunpoint by three young Negro males. After forcing the employees of the store to lie down in the back, the three men fled from the store with an amount of \$1,791.69 (Tr. 30) in cash, money orders, paychecks, various narcotics including Hycodan powder, Dilaudid powder, Cocaine powder, Demerol tablets, and Codeine tablets (Tr. 22-23) and a few miscellaneous items of no value. No witness to the robbery identified any of the defendants.

At approximately 10:00 p.m. the same night, Officers William E. Manning and Charles H. Cook of the D. C. Metropolitan Police Department, who were patrolling in a police scout car, saw an automobile bearing D. C. license number 151-992 go through a stop sign on Irving Street and 18th Street, N.E., at a high rate of speed (Tr. 88). A chase ensued, during the course of which the officers lost and regained contact, learned by radio of the Peoples robbery, and verified that the automobile had been reported stolen (Tr. 89-91).^{*/}

^{*/} Celia Dail, the owner of the car, testified that she had parked it on the evening of November 29, found it missing the next morning, and next saw it at the precinct on the following Sunday morning (Tr. 79-85).

Officer Manning testified that when he originally saw the car, he observed only two people in it (Tr. 89, 119-120). When he again saw the car after losing contact for several blocks, he observed three occupants (Tr. 90-91, 121). He identified Winslow as the driver and Wilson as a passenger (Tr. 93-94). He did not identify Robinson at all.

The chase came to an abrupt halt at the corner of First Street and Rhode Island Avenue, N.W., when, due to the hazardous weather conditions, the driver of the automobile lost control. The car jumped the curb and stalled (Tr. 92). Officer Manning testified that two of the occupants of the vehicle -- Wilson and Winslow -- fled on foot (Tr. 92).

Officer Manning further testified that he found a black satchel behind the driver's seat of the automobile (Tr. 96). In this satchel Officer Manning found cash, Peoples Drug Store payroll checks, money orders, and narcotics of the kind which had been taken from the store (Tr. 97-108). Officer Manning also found a Luger, P-38 gun lying alongside the driver's side of the automobile (Tr. 109) and a Remington .32 caliber automatic pistol on the front seat floorboard on the passenger side of the automobile (Tr. 110).

Officer Cook generally confirmed Officer Manning's version of the chase. On direct, he said that he observed three men in the car during the chase, but did not identify Robinson as one of them, although he did identify Winslow and Wilson (Tr. 154, 155). He testified that when

the police car stopped after the chase, he dived from the car and tripped and fell, and was "completely laying out on the ground" (Tr. 154, 174). According to his testimony, he then noticed Robinson, who he said was leaving the automobile from the rear door, although he "could just see the top part of his head" (Tr. 154; compare Tr. 174-175). According to Officer Cook, a struggle between Robinson and himself then ensued, in the course of which Officer Cook knocked a pistol from Robinson's hand to the ground (Tr. 154). Evidence was presented that Robinson had no permit to carry a gun, and that the weapon Cook claimed to have taken from him had been test-fired successfully (Tr. 219-220, 157-158).

Robinson denied having committed any act alleged in the indictment and presented an alibi defense. In his testimony, Robinson said that for twenty minutes prior to 9:30 p.m., November 30, 1967, he had been in Louie's Billard Parlor at 7th and T Streets, N.W. (Tr. 319). About 9:30 p.m., he called his sister, Sheila Groves, 2723 Sixth Street, N.E., to ask if he could borrow ten dollars from her. He also called his mother (Tr. 319-320, 330). Robinson's mother and sister verified receiving the respective phone calls (Tr. 380, 385). After making the phone calls, Robinson left the pool hall and started walking toward his sister's house out Florida Avenue and up Rhode Island Avenue (Tr. 320-321).

Robinson testified that, when he reached First Street and Rhode Island Avenue, a car turned the corner and, in order to try to avoid being hit by the car, he slipped and fell on the ground (Tr. 321). As he fell, Robinson saw a police scout car turn the corner, and, as he testified, the next thing he knew Officer Cook was placing a pistol to his ribs and telling him he was under arrest for robbery (Tr. 321-322). Robinson further testified that he had never been in the Peoples Drug Store at 2066 Rhode Island Avenue and that he had never seen either of the two other defendants before he was arrested, or any of the complaining witnesses (Tr. 322-323).

Defendant Wilson also presented an alibi defense.

In his testimony, which was not corroborated in any way by any witness, Wilson said that, on the night of November 30, 1967, he was in Louie's Billiard Parlor, Seventh and T Streets, N.W. until 9:30 or 9:35 p.m. (Tr. 257-258), following which he left for a friend's home on Division Street, N.E., arrived by bus at the Peoples Drug Store where he was met by two men leaving the store in a hurry who forced him into a car which a third man was driving and drove off (Tr. 260-262).

On cross-examination, and again on redirect, defendant Wilson testified that there were several people in Louie's Billiard Parlor on the night of November 30, but that he did not see anyone there whom

he recognized (Tr. 285, 310). Also on cross-examination, Robinson testified that he had not seen Wilson in Louie's Billiard Parlor (Tr. 366).

In his closing argument, the prosecutor specifically drew the Jury's attention to Robinson's and Wilson's alibis, commenting sarcastically on the "coincidence" that Robinson was "at that same pool room" as Wilson, shortly before they were arrested at about the same time (Tr. 484-485).

ARGUMENT

I. The Trial Court Committed Reversible Error In Failing To Grant Robinson A Separate Trial From Co-Defendant Wilson Whose Inconsistent Alibi Testimony Prejudiced Robinson.

[In connection with this portion of the brief, Appellant Robinson wishes the Court to read his Motion for Severance, and the following portions of the transcript: 151-159, 170-176, 256-315, 318-382, 385-387, 402-407, and 484-485.]

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

By its terms, Rule 14 requires the trial judge to be vigilant to prevent prejudicial joinder of offenses or defendants and, if prejudice is present, to "grant a severance of defendants or provide whatever other relief justice requires." It is well established, moreover, that the trial judge "has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States, 362 U.S. 511, 516 (1960); Sims v. United States, ____ U.S. App. D.C. ____, 405 F.2d 1381, 1382 (1968); Flores v. United States, 379 F.2d

905, 909 (5th Cir. 1967); and United States v. Kelly, 349 F.2d 720, 759 (2nd Cir. 1965).

Decisions in several Circuits have held that the refusal of the trial court to allow a severance in cases in which one or several defendants have confessed or made statements or admissions damaging to other defendants is reversible error, and have made clear that severance should be granted when prejudice appears, even if it may not have been erroneous to deny severance based on pre-trial motion papers. See Sims v. United States, *supra*, (incriminating statements by co-defendants; cautionary instructions insufficient to cure); Flores v. United States, *supra* (government witness testifying re co-defendant's statement implicating defendant required severance); United States v. Kelly, *supra* (evidence against co-defendants in conspiracy trial including letter directly implicating appellant created situation in which the trial judge should have granted severance); Barton v. United States, 263 F.2d 894 (5th Cir. 1969) (out of court statement to police by one defendant implicating the other required severance); and Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955) (where confession of one defendant implicated the other, refusal to grant severance was error because the two defendants "were so inseparably connected that the jury could hardly have been expected to return a verdict of guilty against one and of not guilty as to the other").

Recent decisions of this Court are consistent. In addition to the Sims case, supra, see Cross v. United States, 118 U.S. App. D.C. 325, 335 F.2d 987 (1964) (joinder of counts in multiple defendant trial held to prejudice both defendants); Gregory v. United States, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966) (joinder of counts prejudicial because of the "cumulative effect" of evidence on jury). Cf. Rhone v. United States, 125 U.S. App. D.C. 47, 48, 365 F.2d 980, 981 (1966) (recognizing that "conflicting and irreconcilable defenses" by co-defendants create a "danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty").

In the instant case, whether or not prejudice to Robinson was apparent at the time his Motion for Relief from Prejudicial Joinder was denied on March 8, 1968, prejudice requiring a Rule 14 severance of defendants became apparent in the course of the trial.

Inherently prejudicial to Robinson was the damaging evidence with respect to defendants Winslow and Wilson accumulated at trial. As noted in United States v. Kelly, supra, such evidence was bound to "rub off" on Robinson, even though no prosecution witness placed Robinson at the robbery scene or positively identified him as being in the getaway car, except for Officer Cook, who said he saw Robinson coming out of the car after he (Cook) fell trying to tackle Winslow (Tr. 154-155, 174).

Most directly prejudicial to Robinson was defendant Wilson's alibi testimony that he played pool in Louie's Billiard Parlor until 9:30 p.m., November 30, 1967 (Tr. 257-258), but did not recognize any of the several people there at that time (Tr. 285, 310). After Wilson's testimony, Robinson's testimony that he was in the same Louie's Billiard Parlor on the same night until 9:30 p.m. (Tr. 319) could hardly have been given a fair evaluation by the jury, particularly when Wilson's story and presence in court gave the prosecutor the opportunity to establish on cross of Robinson that the latter had not seen Wilson in Louie's (Tr. 366).

Had Robinson been tried alone, his partially corroborated alibi defense might well have presented a close question for the jury, particularly since he was not identified by any witness except Officer Cook, whose ability accurately to observe events at the scene of the crash was hampered by his own fall on the ice (Tr. 154, 174). As it was, however, the presentation of conflicting alibi testimony by Wilson must inevitably and unnecessarily have created an extraneous question in the jury's mind as to whether either of the defendants was telling the truth. This exposed Robinson to the "danger that the jury will infer that this conflict alone demonstrates that both are guilty." Rhone v. United States, supra, 125 U.S. App. D. C. at 48, 365 F.2d at 981.

Moreover, whatever doubts the jury may have had about the Louie's Billiard Parlor testimony as a result of the cross-examination of Wilson (Tr. 267-307), and the rebuttal testimony discrediting his testimony

concerning his bus ride from Louie's to Peoples (Tr. 402-407), must also have "rubbed off" on Robinson, to the latter's detriment. United States v. Kelly, supra, 349 F.2d at 759; see Cross v. United States, supra, 118 U.S. App.D.C. at 328, 335 F.2d at 991 (prejudice resulted when "self-defeating testimony" of co-defendant may have caused jury to discredit another's "strong alibi defense").

Confirming and aggravating the prejudice to Robinson arising from his trial jointly with Wilson, the prosecutor's closing argument clearly urged the jury to infer the joint guilt of Wilson and Robinson from their respective alibis. The prosecutor sarcastically commented on the "coincidence" that Wilson and Robinson had been "at that same pool room" at the same time, and connected this with their arrest together shortly thereafter (Tr. 484-485).

In these circumstances fair and separate consideration by the jury of the case against Robinson was rendered virtually impossible. Particularly since Robinson had raised the severance issue before trial, under Rule 14 the trial judge should have performed his "continuing duty" to guard against prejudice by granting a severance sua sponte, at least when the prosecutor in argument sought to capitalize on prejudicial conflict the alibi testimony, if not earlier when the conflict first became apparent during Robinson's testimony. Schaffer v. United

States, supra, 362 U.S. at 516.* /

* / Severance at the time the conflict first became apparent would have caused only minimal inconvenience since Wilson and Winslow could still have been tried together. Even at the argument stage, the jury could have properly been allowed to take Winslow's case, which was not involved in the conflict. Thus questions of "economy and efficiency" of judicial administration are not of particular importance here, and in any event these goals must be achieved only "without substantial prejudice to the right of the defendants to a fair trial." Bruton v. United States, 391 U.S. 123, 131 n.8 (1968).

II. The Purported "Indictment" Upon Which Defendant Robinson Was Tried Was Not The "Indictment" Of A Grand Jury Required By The Fifth Amendment So That The District Court Never Acquired Jurisdiction Over Him.

[In connection with this portion of the argument, Appellant Robinson wishes the Court to read the "presentment" of January 2, 1968, the "indictment" filed January 22, 1968, and the grand jury transcript of January 2, 1968.]

In Gaither v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____, Nos. 21780, 22148 (April 8, 1969) (hereinafter "Gaither I"), this Court held that indictments filed under the procedure long followed in this jurisdiction were fatally defective. The Court stated:

"We conclude then that Rule 6 [Federal Rules of Criminal Procedure] requires the Grand Jury as a body to pass on the actual terms of the indictment. We are compelled to this conclusion largely by the Constitutional principles of Bain, Stirone, and Russell, which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a Grand Jury." (Gaither I Slip Op. at 14).

In so deciding, this Court implemented the Fifth Amendment's guarantee that " . . . no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"

In the instant case, defendant Robinson was indicted through the same defective procedure condemned in Gaither. So far as the record shows, a bare bones presentment charging Robinson with "robbery, assault with dangerous weapon, assault on member of police force with dangerous

weapon, unauthorized use of vehicle" and "carrying dangerous weapon" was returned on January 2, 1968, the same day the Grand Jury heard the testimony of Officer Manning (see Grand Jury Tr.).^{*/} Thereafter, a detailed, seventeen-count indictment was drawn up by the U.S. Attorney, endorsed "a true bill" by the Grand Jury foreman, and filed in open court on January 22, 1968.

Under the Gaither re-hearing decision, Gaither v. United States, Nos. 21780, 22148, 21864, ____ U.S.App.D.C. ____, ____ F.2d ____ (April 24, 1969)(hereinafter "Gaither II"), therefore, Robinson would clearly be entitled to reversal of his conviction and dismissal of the indictment if he had challenged the indictment procedure before trial as Gaither and Tatum did. In both Gaither I, Slip Op. p. 16, n.32, and Gaither II, Slip Op. p. 6, n. 7, however, this Court appears to have indicated the view that this point must be made by pre-trial motion, a procedure which was not followed in this case. In this connection, the Court has relied on Rule 12(b)(2) of the Federal Rules of Criminal Procedure in Jackson v. United States, 123 U.S.App.D.C. 276, 280 n.3, 359 F.2d 260, 264 n.3 (1965), cert. den., 385 U.S. 877(1966).

^{*/} Neither the Grand Jury minutes made available to defense counsel, nor the presentment on its face indicate the concurrence of twelve Grand Jurors in all the terms of the presentment. In any event, this Court has held that such a presentment "lacking as it does the specificity of an adequate charging document" does not satisfy Constitutional requirements. Gaither I, supra, Slip Op., p. 7, n.13.

This limitation, which was not necessary to the decision in Gaither and cannot be regarded as part of the Gaither holding, is inconsistent with Gaither's rationale, and unsupported by the authorities on which the Gaither panel relied.

As noted, the Gaither decision that defective "indictments" of the type used in this case are not the "indictment of a Grand Jury" required by the Fifth Amendment was based not only on Rule 6 of the Federal Rules of Criminal Procedure, but also on the "Constitutional principles of Bain, Stirone, and Russell," Gaither I, Slip. Op. p. 14. Ex parte Bain, 121 U.S. 1 (1887), in turn makes clear that such defects in the indictment are jurisdictional in nature. Where the indictment is defective, "the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned." Id. at 13, 14.

It follows therefore that the so-called "indictments" returned in this jurisdiction prior to Gaither I do not exhibit mere "procedural" defects requiring pre-trial motions under Rule 12. Rather, since the defect is jurisdictional, it is one which need not be raised before trial,

and which Rule 12(b)(2) expressly provides "shall be noticed by the Court at any time during the pendency of the proceeding."^{*/}

The Jackson case, supra, which involved a "variance" between the language of the indictment and the actual proof, provides no support for any requirement that defects of the type found here, which like "amendments" make the so-called "indictment" no indictment, can only be challenged before trial. Compare Gaither I Slip Op., pp. 14-16.

Nor can there be in this case any "presumption that the indictment as brought would have been approved by the Grand Jury had the jurors been given a chance to see it." Gaither I Slip Op., p. 16. Inspection of the Grand Jury minutes clearly shows that Officer Manning's testimony merely sketched the alleged offenses in the broadest terms. As victim of the robbery, he mentioned "Peoples Drug Store" without further identifying it (Grand Jury Tr. 2). He further testified to recovering from the suspects' car various property and money connected with "Peoples Drug Store" and/or "Mr. Funkhouser, the manager" (Grand Jury Tr. 4). Also, although Officer Manning told the Grand Jury about a "radio call" which he had received with respect to a "holdup" at

^{*/} Since Robinson raises this jurisdictional contention on appeal from his conviction, the Court need not decide now whether the absence of a Fifth Amendment indictment is a deprivation of due process vulnerable to collateral attack. Compare, e.g., Stoval v. Denno, 388 U.S. 293 (1967).

Peoples (Grand Jury Tr. 2), there was no testimony before the Grand Jury that any person other than Officer Cook had been assaulted or threatened with a dangerous weapon.

In sharp contrast to Officer Manning's sketchy Grand Jury testimony, the seventeen-count indictment described the alleged offenses in great detail. Separate robbery counts relating to the property of Peoples Drug Stores, Incorporated, were charged as to takings from the "immediate actual possession" of Warren M. Funkhouser, Stephanie V. Kaiser, Mabel F. Swaim, Martha Uzzell and Richard B. Coughlin, although only Mr. Funkhouser had been mentioned before the Grand Jury. (Counts 1, 3, 5, 7, 9). The eleventh count of the indictment charged robbery of the personal property of one Benoni Abbo-Offei, although neither Mr. Abbo-Offei nor his property (one keycase) were mentioned to the Grand Jury. Compare Grand Jury Tr. 4.

Also despite the fact that no Grand Jury testimony except Officer Manning's hearsay reference to a "holdup," plus the circumstantial evidence of the finding of guns in the car (Grand Jury Tr. 2, 4-5) supported such charges, the indictment contained eight separate counts of assault with a dangerous weapon, that is, a pistol, on Warren Funkhouser, Stephanie Kaiser, Mabel Swaim, Martha Uzzell, Richard Coughlin, Benoni Abbo-Offei, Edward W. Carson, and Theodore Rainsford. (Counts 2, 4, 6, 8, 10, 12, 13, 14.)^{*/}

^{*/} The sixth count of the indictment relating to an assault with dangerous weapon on Mabel Swaim was dismissed as to all defendants.

Thus, comparison of the Grand Jury minutes with the indictment indicates that there is no basis on which it can even be speculated that the "indictment" on which Robinson was tried was in fact the "indictment of a Grand Jury" as required by the Fifth Amendment. In this respect, this case may represent a rather unusual departure from normal pre-Gaither indictment practice. If this is so, reversal of Robinson's conviction need not necessarily have any "serious adverse effect upon the administration of justice in the District of Columbia," Gaither I Slip Op., p. 16, since the "presumption that the indictment reflects the will of the Grand Jury," Id. at 17, could still be applied in other cases.

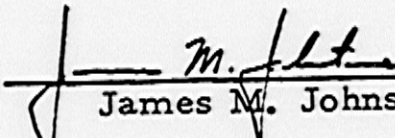
With respect to this indictment of this defendant, however, there can be only one conclusion. It did not reflect and could not have reflected the will of the Grand Jury. Hence, it was not the "indictment of a Grand Jury" required by the Fifth Amendment; the District Court never acquired jurisdiction to proceed in the case; and the conviction and sentence are void. Ex parte Bain, supra, 121 U.S. at 13; Gaither I and Gaither II, supra.

CONCLUSION

If the Court agrees with the contentions in Part I of this brief, Robinson's conviction should be reversed and the case remanded to the District Court with instructions to conduct a new trial separate from Wilson.

If the Court agrees with the contentions in Part II of this brief, the conviction should be reversed and the case remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

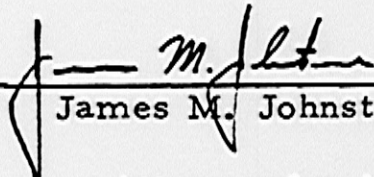

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May 19, 1969

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing appeal of Charles Robinson in Case No. 22,722 has been made by hand delivery thereof to the office of Thomas A. Flannery, United States Attorney for the District of Columbia, United States Courthouse, Washington, D. C., and by first class mail, postage prepaid, to the office of Julius Schlezinger, attorney for Charles Wilson, Jr., this 19th day of May, 1969.


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REPLY BRIEF FOR APPELLANT

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* <u>Bruton v. United States</u> , 391 U.S. 123 (1968)	6
<u>Crosby v. United States</u> , 119 U.S. App. D.C. 244, 339 F.2d 743 (1964)	10, 12
<u>Delli Paoli v. United States</u> , 352 U.S. 232 (1957)	5, 6
* <u>Desist v. United States</u> , 394 U.S. 244 (1969)	10, 11, 13
<u>De Stefano v. Woods</u> , 392 U.S. 631 (1968)	10
<u>Flores v. United States</u> , 379 F.2d 905 (5th Cir. 1967)	6, 7
<u>Fuller v. Alaska</u> , 393 U.S. 80 (1968)	10
* <u>Gaither v. United States</u> , Nos. 21780, 22148 (April 8, 1969), modified on rehearing, <u>Gaither v. United States</u> (April 24, 1969)	1, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	10
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956)	10, 16
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964)	10
<u>Johnson v. New Jersey</u> , 384 U.S. 719 (1966)	10, 11
* <u>Linkletter v. Walker</u> , 381 U.S. 618 (1965)	10, 11, 12, 16
* <u>Rhone v. United States</u> , 125 U.S. App. D.C. 47, 365 F.2d 980 (1966)	2, 4, 7

<u>Case</u>	<u>Page</u>
<u>Russell v. United States</u> , 369 U.S. 749 (1962)	12
* <u>Schaffer v. United States</u> , 362 U.S. 511 (1960)	2, 5
* <u>Showgurow v. State</u> , 240 Md. 121, 213 A.2d 475 (1965)	16
<u>Stirone v. United States</u> , 361 U.S. 212 (1960)	12
* <u>Stovall v. Denno</u> , 388 U.S. 293 (1967)	10, 11, 13
* <u>Tehan v. Shott</u> , 382 U.S. 406 (1966)	10, 16
<u>United States v. Choate</u> , 276 F.2d 724 (5th Cir. 1960)	10, 12
<u>United States v. Krepper</u> , 159 F.2d 958 (3d Cir. 1946), <u>cert. denied</u> , 330 U.S. 824 (1947)	10, 12
Federal Rules of Criminal Procedure	
Rule 6	7
Rule 12(b)(2)	10

*Cases and authorities chiefly relied upon are marked with an asterisk.

PRELIMINARY STATEMENT

In his opening brief, appellant Charles Robinson asserted two substantial points either of which invalidate his conviction. They are:

- I. The trial court committed reversible error in failing to grant Robinson a separate trial from co-defendant Wilson whose inconsistent alibi testimony prejudiced Robinson;
- II. The purported "indictment" upon which defendant Robinson was tried was not the "indictment" of a grand jury required by the Fifth Amendment so that the District Court never acquired jurisdiction over him.

We show herein that the U.S. Attorney's answering brief (a) fails to take account of the record facts and pertinent recent precedents bearing on Point I, and (b) misconceived the real issues raised by Point II, which presents the Court with an actual case or controversy as to the retroactive application of its Gaither decision.

ARGUMENT

- I. The Trial Court Committed Reversible Error In Failing To Grant Robinson A Separate Trial From Co-Defendant Wilson Whose Inconsistent Alibi Testimony Prejudiced Robinson

[Please refer to record references in Brief for Appellant Robinson, Part I, at 8.]

A trial judge "has a continuing duty at all stages of the

trial to grant a severance if prejudice does appear," Schaffer v. United States, 362 U.S. 511, 516 (1960), and this Court has recognized that such prejudice does appear "where the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Rhone v. United States, 125 U.S. App. D.C. 47, 48, 365 F. 2d 980, 981 (1966).

Thus, it clearly would be error for the trial judge to fail to sever the cases if joint trial prejudiced either or both defendants by creating the "danger that the jury will unjustifiably infer" from a conflict in testimony "that both are guilty." Here consideration of the total impact of the trial testimony shows that there was indeed an irreconcilable conflict between the claims of Robinson and co-defendant Wilson, that both were prejudiced thereby, and that it was therefore error to continue the joint trial once the conflict was apparent.

At trial defendants Robinson and Wilson both relied on alibis to show their lack of involvement in any type of criminal activity on the night of the robbery with which they were charged. Both claimed they were in Louie's Pool Hall sometime between 9:00 and 9:30 P.M., but each denied seeing the other. The U. S. Attorney contends (Br. p. 9-12) that the discrepancies in alibi

testimony fell short of irreconcilable conflict because the jury could have found that Robinson and Wilson were at Louie's at different times or that they could justifiably not have remembered seeing each other. Neither assumption is sustained by the record.

Wilson consistently maintained that he was in the pool hall for two hours and left between 9:25 and 9:35 P.M. (Tr. 258, 286, 291, 292, 309). He remembered seeing a clock showing a minute before 9:30 before he left. (Tr. 309). Robinson stated that he arrived at Louie's about 9:05 (Tr. 364), that he had been there for fifteen minutes before he called his mother and sister from Louie's (Tr. 362-63), and that he left between 9:35 and 9:45 P.M. (Tr. 364, 366). His mother testified that he called between 9:00 and 9:15, (Tr. 380) and his sister estimated the call to her at 9:30 (Tr. 385). From their testimony, therefore, the jury had to conclude they were in Louie's together between 9:05 and 9:25, unless one of them was lying.* /

Furthermore, there was direct testimony from both that the other was not present. Robinson's testimony about Wilson's presence was unequivocal:

* / In his closing argument, prosecutor Caputy implied they were in Louie's at the same time. See Tr. 484.

"Q. [Mr. Caputy] Now, in that pool room did you see this person here? And I am pointing to Mr. Wilson.

A. [Mr. Robinson] I did not."^{*/}

Wilson was never asked specifically whether Robinson was present, but he repeatedly denied seeing anyone he recognized. (Tr. 284, 285, 310-11). When the jury combined this disclaimer with the testimony that there were very few others in the pool hall (Tr. 284, 286, 366) and the fact that Wilson necessarily saw Robinson one-half hour later when they were arrested together, it could hardly conclude that Wilson was merely unobservant while at Louie's."^{**/}

Clearly, as foreseen by this Court in Rhone v. United States, supra, the contradiction between the two alibis prejudicially damaged the credibility of both Wilson and Robinson."^{***/} The prejudice was compounded by the prosecutor's closing remarks. In the

^{*/}Tr. 366. See also Tr. 367. (Robinson again denied seeing Wilson in the pool room although he remembered seeing him when brought to the car by the arresting officer.)

^{**/}Contrary to the suggestion of the U.S. Attorney (Br. at 12-13), counsels' failure to cross-examine either witness on this point is not an indication of their failure to recognize prejudice, but rather a clear perception on their part that further questioning could only further emphasize the conflict and magnify its impact on the jury.

^{***/}This redounded particularly against defendant Robinson, whose alibi defense was otherwise substantial, being corroborated by both his mother and sister.

middle of his argument attacking the credibility of all three defendants, and immediately after discussing the discrepancies in Wilson's alibi, he stated:

Then, members of the jury, there is a coincidence that just comes to my mind. When explaining his activities that night, Wilson says that he winds up, that he was at a pool room, Louie's on T Street, and he left there around 9:30 or thereabouts, and the coincidence, members of the jury, at that same pool room is Robinson. Tr. 484; see also Tr. 483.

It was therefore error for the trial court to fail to sever the charges against Robinson and Wilson.^{*/} None of the cases cited by the U. S. Attorney holds to the contrary. Most of them deal with the problem of damaging evidence introduced against a co-defendant (usually through his confession or extra-judicial statements) with a cautionary instruction from the trial judge that the jury should not consider it with reference to the other defendant. Following Delli Paoli v. United States, 352 U.S. 232 (1957), the courts uniformly found no prejudice in this procedure. Those cases which did not deal with this exact factual situation relied by analogy

^{*/} Robinson's pre-trial motion for severance alerted the judge to the possibility of prejudice, bringing clearly to his attention his continuing responsibility in this regard. See Schaffer v. United States, supra.

on the Delli Paoli ruling as setting the standard for prejudicial joinder.

The Supreme Court's decision last year in Bruton v. United States, 391 U.S. 123, reversed Delli Paoli, thus completely altering the major landmark in the law of joint trials. Although the Court's opinion rested on denial of Bruton's constitutional rights to confront and cross-examine those giving adverse testimony -- an element not present in Robinson's case -- it also pointed to a new balance between the rights of jointly-tried defendants and the efficiency of judicial administration. Bruton, supra, at 134-35. In discussing the interaction of the rules of joinder and severance (Bruton, at 131 n. 6) the Court stated:

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence."

Several pre-Bruton decisions point towards this new balance -- weighing the potential prejudice to the defendants against the actual loss of judicial efficiency in the particular litigation. See Flores v. United States, 379 F. 2d 905, 909 (5th Cir. 1967); Barton v. United States, 263 F. 2d 894, 898 (5th Cir. 1959) (recognizing before Bruton that the federal courts must .

"be alert to accord to every defendant a completely fair trial.") And this Court has also recognized the varying degrees and sources of prejudice. Rhone v. United States, supra. As in Flores, this case was not complex and granting a severance "would not seriously have inconvenienced judicial administration." On the other hand, it would have removed all possible prejudice to the two defendants whose alibis conflicted. Failure to do so necessarily hurt Robinson's chances that the jury would consider "only relevant and competent evidence bearing on the issue of guilt or innocence."

II. The Purported "Indictment" Upon Which Defendant Robinson Was Tried Was Not The "Indictment" Of A Grand Jury Required By The Fifth Amendment So That The District Court Never Acquired Jurisdiction Over Him

[In connection with this portion of the argument, Appellant Robinson wishes the Court to read the "presentment" and "indictment" attached as Appendices A and B hereto.]

In Gaither v. United States, Nos. 21780, 22148, slip op. at 14 (April 8, 1969) (hereinafter Gaither I) this Court held that the long-standing indictment practice of this jurisdiction (wherein the full grand jury approved only an abbreviated "presentment" and the grand jury foreman alone passed upon the sufficiency of the completed indictment drawn up by the U. S. Attorney) violated Rule 6

of the Federal Rules of Criminal Procedure and "constitutional principles" of Supreme Court decisions "which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury." However, based on the indictment's being drawn up by the prosecutor's office which held the grand jury hearing, and being signed by the grand jury foreman, the Court created a presumption that it would have been approved by the grand jurors had they been given the chance to see it. It then set forth an elaborate procedure for examination of grand jury minutes by defendants in order to establish a "reasonable possibility" that the grand jurors would not have approved the indictment as brought. The only other alternative foreseen was "dismissal of at least all pending indictments brought under this defective procedure." This was rejected because of its impact on criminal law administration. Gaither I, slip op. at 18. Applying its test to the case before it, the Court found the Gaither defendants not prejudiced by failure to have their indictment approved by 12 grand jurors.

Upon rehearing, Gaither v. United States, Nos. 21780, 22148 (April 24, 1968) (hereinafter Gaither II), the Court reversed its position, ruling that the inability of the U. S. Attorney's office to have all grand jury minutes transcribed because only one court

reporter had been assigned to grand jury duty required that "the presumption . . . established subject to rebuttal in [its] first opinion -- that pending indictments signed by the foreman of the grand jury would have been approved by the requisite 12 jurors -- must now be made irrebuttable," and that "indictments brought before [the date of the first opinion], other than that in the case at bar, will not be subject to challenge for the procedural defect found in this case." On the other hand, the two convictions before the Court were struck down under the per se standard applied to all indictments returned after the first opinion.

Thus, the decision to make the Gaither I ruling wholly prospective was made in the context of a case which involved no retroactivity issue. The indictment against Robinson and his co-appellants was brought under the same procedure condemned in Gaither I; therefore, the issue of Gaither's retroactivity is now for the first time squarely presented to the Court. Appellant Robinson urges that the application of the governing retroactivity principles be re-evaluated in light of the considerations which follow.

There are essentially three different classes of cases for which retroactivity must be determined -- those in which a timely motion could still be filed on the date of Gaither I; those not yet

final on that date, and those subject only to collateral habeas corpus attack. Robinson's case falls in the middle category, he did not question the validity of the indictment until appeal.^{*/}

In determining the proper availability of the Gaither precedent to each category of cases, the Court should be guided by the principles developed by the Supreme Court in deciding this issue in a variety of different contexts in recent years.^{**/} The criteria to be considered and the relative weight to be given them have been enunciated in very recent cases:

^{*/} However, under Fed. R. Crim. P. Rule 12(b)(2) jurisdictional issues may properly be raised at any time. See, e.g., Crosby v. United States, 119 U.S. App. D.C. 244, 245, 339 F. 2d 743, 744 (1964); United States v. Choate, 276 F. 2d 724, 728 (5th Cir. 1960); United States v. Krepper, 159 F. 2d 958, 970 (3d Cir. 1946), cert. denied, 330 U.S. 824 (1947).

^{**/} The Court made fully retroactive the rights to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963), to a free transcript on appeal, Griffin v. Illinois, 351 U.S. 12 (1956), and to a judicial determination of the voluntariness of a confession, Jackson v. Denno, 378 U.S. 368 (1965). It limited retroactivity to those cases not yet final for excluding evidence from unlawful searches and seizures, Linkletter v. Walker, 381 U.S. 618 (1964), and for excluding comment on defendant's failure to take the stand, Tehan v. Shott, 382 U.S. 406, 409 (1966). And it has made absolutely non-retroactive Miranda and Escobedo rights, Johnson v. New Jersey, 384 U.S. 719 (1966), the right to counsel at pre-trial identification, Stovall v. Denno, 388 U.S. 293 (1967), the immunity from wiretapping under §605 of the Communications Act, Fuller v. Alaska, 393 U.S. 80 (1968), the immunity from eavesdropping under the Fourth Amendment, Desist v. United States, 394 U.S. 244 (1969), and the right to jury trial in contempt cases, DeStefano v. Woods, 392 U.S. 631 (1968).

"The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967).

The first is the most important of the criteria:

"It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." Desist v. United States, 394 U.S. 244, 251 (1969).

The clearest application of the controlling first criterion -- the purpose to be served by the new standards -- has been in the exclusionary rule cases, where the underlying purpose for the Constitutional rule has been deterrence of law enforcement from acts which violate the rights of individuals. This end is not served by retroactive application to past conduct. Because the evidence involved is usually both probative and reliable, no basic miscarriage of justice is likely to arise from its use.^{*/} Additionally, the defendant has never in such cases been left wholly without remedy, because of the availability of pre-existing Fourteenth Amendment due process objections.^{**/}

^{*/} See, e.g., Linkletter v. Walker, supra; Johnson v. New Jersey, supra; Stovall v. Denno, supra; Desist v. United States, supra.

^{**/} See, e.g., Stovall v. Denno, supra, 388 U.S. at 299.

However, the invalidity of the pre-Gaither indictment procedure would appear to fall at the opposite end of the constitutional continuum, involving "the very integrity of the fact-finding process." Linkletter v. Walker, supra, 381 U.S. at 639. Certainly nothing could be more basic to the criminal defendant than the right to have his case decided by a full petit jury rather than its foreman. This is true for the grand jury as well; its role is equal in importance to that of the petit jury under our two-jury system.

The extraordinary importance of proper grand jury action on an indictment is shown by the opinions of the Supreme Court in this area which have uniformly found defects of the Gaither type to be jurisdictional in nature, requiring dismissal despite waiver or consent and without regard to the existence of actual prejudice.

"To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."*/

*/Russell v. United States, 369 U.S. 749, 770 (1962); see also Ex Parte Bain, 121 U.S. 1, 12-13 (1887); Stirone v. United States, 361 U.S. 212, 216-18 (1960); Crosby v. United States, supra; United States v. Choate, supra; United States v. Krepper, supra.

Moreover, this Court's conclusion in Gaither II has left Robinson and others similarly situated entirely without remedy for defects in grand jury proceedings. By creating an irrebuttable presumption of regularity, and denying access to grand jury minutes for the purpose of establishing prejudice, the Court has closed all avenues to redress in these cases.

Nor does the second criterion set forth in Stovall -- the extent of the reliance by law enforcement authorities on the old standards -- justify wholly prospective application of Gaither. This Court noted in Gaither II, slip op. at 5:

"Thus we have not in any substantial sense 'made new law;' rather we have applied clear existing principles to what appears to be a uniquely deviant procedure."

In fact, the Court chided the U. S. Attorney's office for taking "the perilous course of continuing to use challenged procedure through the weeks between oral argument and decision of the case, despite indications at argument that the court's clear first impression was that the procedure was defective." Id., n.6.

The final factor -- the potential disruption of the administration of justice -- will always weigh in favor of wholly prospective application. However, under the weighing of criteria set forth in Desist, supra, this final factor should not be determinative when a clear contrary direction is indicated by the first two.

The injustice in sacrificing the essential rights of citizens to the convenience of the police, prosecutors, and trial judges is highlighted in this case by the extraordinary reason given by the U. S. Attorney for establishing hardship -- that the prosecutors failed to exercise enough foresight to assure that the transcripts of grand jury minutes could be made available to defendants because of a shortage of stenographic help. This Court concluded in Gaither II, slip op. at 7-9, that the U. S. Attorney had ample notice from prior decisions of this Court and the Supreme Court that transcripts might be required in major quantities and, therefore, that this "bottleneck" was "unjustified."

Because of the manifest injustice of this result, Appellant Robinson urges the Court to reconsider the actual disruption in criminal procedure likely to result from different degrees of retroactivity, including such factors as:

1. The actual number of indictments pending trial on April 8, 1969, and the additional effort required to bring new indictments under a valid procedure. (The Court in Gaither II, slip op. at 5, indicated that 1100 indictments were then pending.)

2. The actual number of criminal cases not yet final on that date, and the burden involved in reindictment and retrial.

3. The likelihood that a number of the cases covered by (1) and (2) above would be dismissed based on prosecutorial discretion considering such factors as time already served.

4. Whether the actual theoretical delays and inconveniences apparent from the mere number of indictments affected might be mitigated by other factors.

In addition to the possibility of dismissals based on prosecutorial discretion alluded to in (3), it might well be possible to assign a new reporter to current grand jury proceedings, freeing the pre-Gaither reporter to devote full time to transcription, and eliminating the circumstance which led to the "irrebuttable presumption" of Gaither II. Availability of pre-Gaither I grand jury transcripts could have two consequences. First, some pre-Gaither II defendants might well prefer a speedy trial -- or a quick appeal on other issues -- to waiting for a grand jury transcript. Second, defendants indicted under valid procedures after Gaither I would probably have an earlier trial because of the removal of some cases from the current calendar

to await transcripts of grand jury minutes.*/

The Supreme Court, the Maryland Court of Appeals and this Court have in similar circumstances found the balance in favor of constitutional protections rather than prosecutorial discomfort. In Linkletter v. Walker, supra, and Tehan v. Shott, supra, the Supreme Court extended the Mapp exclusionary rule and the Griffin rule against comment on failure to take the stand to all cases pending on appeal. Likewise, in Showgurow v. State, 240 Md. 121, 213 A. 2d 475, 482 (1965), the Maryland high court applied a ruling with a similar wide impact on judicial administration -- the unconstitutionality of the state's elimination from trial juries of all atheists -- to all cases not yet

*/ Contrary to the assertion of the U. S. Attorney, Br. at 12-13, Appellant Robinson does not attack the indictment solely on the basis of insufficient evidence. Mindful that the Court might well wish to avoid wholesale dismissals of pre-Gaither indictments, we suggested, on the basis of grand jury testimony available to us, that this case might differ from other pre-Gaither cases in that the testimony before the grand jury was patently insufficient to support any presumption that the grand jury would have returned the indictment. The prosecutor's claim that this is not so -- which is not supported by actual grand jury testimony, and indeed cannot even be tested under the Gaither II "irrebuttable presumption" -- does not affect the validity of Robinson's basic attack on the invalidity of his indictment.

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final. Finally, this Court, in Black v. United States, 122 U.S. App. D. C. 393, 396-97, 355 F. 2d 104, 107-08 (1965) extended the applicability of a new ruling granting the right to counsel in Juvenile Court waiver proceedings to all those waived juveniles whose convictions as adults in District Court were not yet final -- i.e., not sustained on appeal. In Black, the Court ordered new waiver hearings in the Juvenile Court for all non-final cases. It then ordered the following procedure for those cases where a trial had already been held in the District Court. If, on the basis of the new hearing at which the juvenile was represented by counsel, the Juvenile Court should refuse to waive its jurisdiction, the indictment and conviction in District Court would be dismissed. If, however, the Juvenile Court again granted waiver to the adult courts, the trial judge was required to reconsider the outcome of the criminal trial in the light of any new evidence developed during the second waiver hearing, making any adjustments in the prior judgment or sentence, or holding such further proceeding, as new facts warranted.

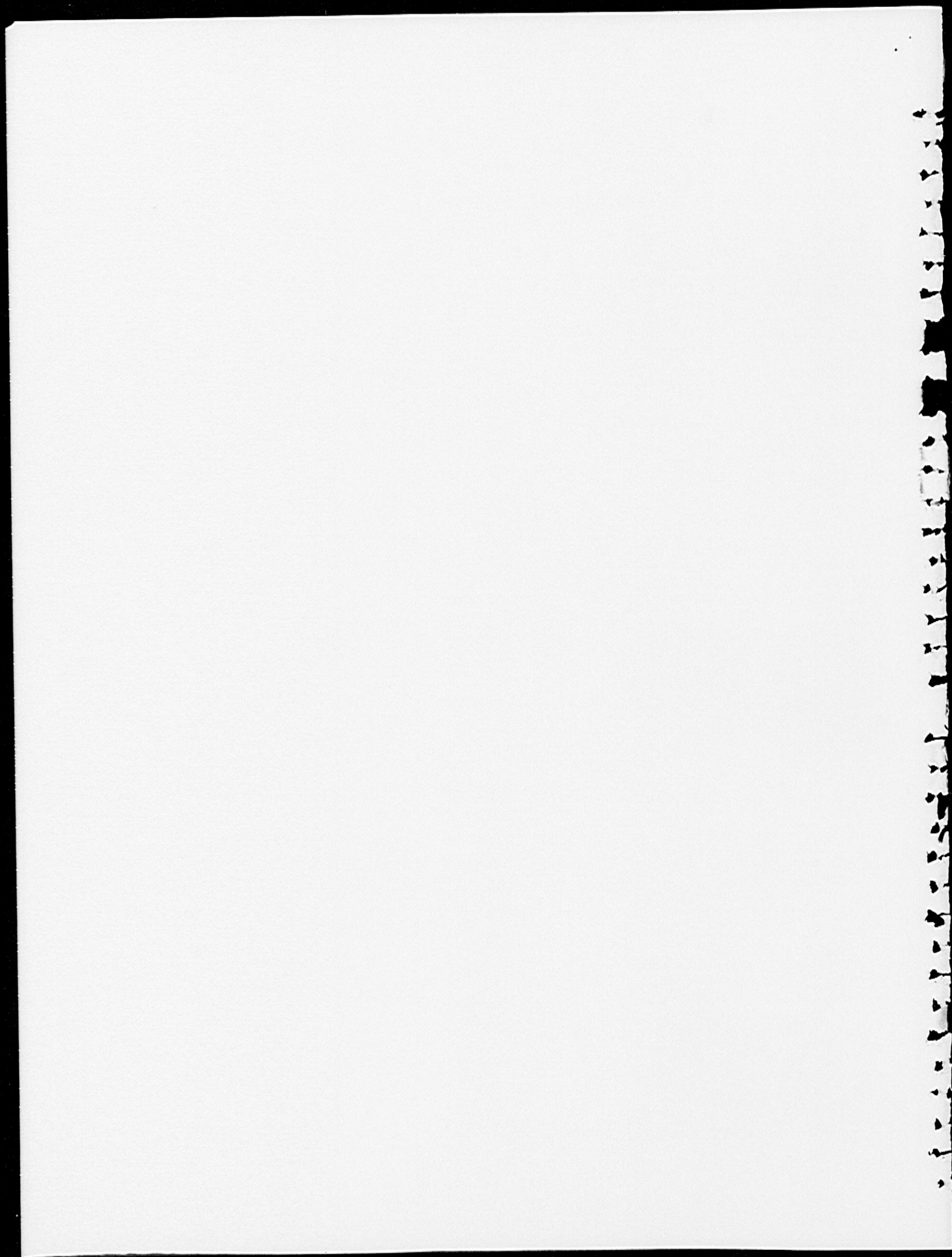
This approach could perhaps be applied to the invalid pre-Gaither indictments. In all cases where the defendant so demanded, a new grand jury proceeding could be held. If after hearing the prosecutor's witnesses the full grand jury returned an identical indictment, the conviction would not be disturbed. If no indictment were

returned, the conviction would be dismissed. Only if a different indictment were approved by the full grand jury would further proceedings in the District Court be necessary.

At the very least, these various factors warrant reconsideration of the Gaither II ruling in order to retain for defendants in Robinson's position some remedy for violation of their Fifth Amendment right to be tried only on an "indictment of a Grand Jury." Certainly, no "irrebuttable presumption," bottomed on the claimed unavailability of a reporter to transcribe grand jury proceedings can validly deprive defendant of this basic right.

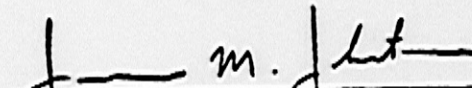
CONCLUSION

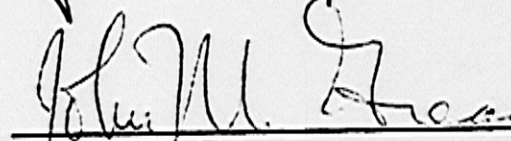
If the Court agrees with the contentions of Part I of this brief, Robinson's conviction should be reversed and the case remanded to the District Court with instructions to conduct a new trial separate from Wilson.



If the Court agrees with the contentions in Part II of this brief, the conviction should be reversed and the case remanded to the District Court with instructions to grant appropriate relief.

Respectfully submitted,


James M. Johnstone


John M. Greacen

Attorneys for Appellant
(Appointed by this Court)

1776 K Street, N. W.
Washington, D. C. 20006

October 2, 1969

APPENDIX A

Form No. USA-9x-194
(Ed. 8-27-59)

66-63

United States District Court

IN OPEN COURT

for the District of Columbia

JAN 22 1968

HOLDING A CRIMINAL TERM

ROBERT M. STEARNS, CLERK

G. J. No. 1834-67

November Grand Jury 1967 #1

District of Columbia

to wit:

Sworn in on Nov 1 Term, A. D. 1967

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon
our oaths, do PRESENT

Charles Wilson, Jr.

Charles Robinson

Maurice Thindrow

Robbery, Assault with Dangerous Weapon
Assault on Member of Police Force
with Dangerous Weapon, Unauthorized
use of Vehicle

Charles Robinson

Carrying Dangerous Weapon

at the District aforesaid, on the 22 day of January, A. D. 1968

Edward D. Fick

Foreman.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED IN OPEN COURT

JAN 22 1968

Holding a Criminal Term

ROBERT M. STEARNS, CLERK

Grand Jury Sworn in on November 1, 1967

The United States of America

v,

Charles Wilson, Jr.
Charles Robinson
Maurice Winslow

: Criminal No.

66-63

: Grand Jury No. 1834-67

: Violation: 22 D.C.C. 2901, 502,
505(b), 2204, 3204

(Robbery, Assault With Dangerous
Weapon, Assault on Member of Police
Force With Dangerous Weapon,
Unauthorized Use of Vehicle,
Carrying Dangerous Weapon)

The Grand Jury charges:

FIRST COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Warren M. Funkhouser, property of Peoples Drug Stores, Incorporated, a body corporate, of the value of about \$1,545.18, consisting of a quantity of narcotics, two hundred and fourteen money orders and \$1,520.18 in money.

SECOND COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Warren M. Funkhouser with a dangerous weapon, that is, a pistol.

THIRD COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Stephanie V. Keyser, property of Peoples Drug Stores, Incorporated, a body corporate, of the value of about \$144.30, consisting of \$144.30 in money.

88-63

FOURTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Stephanie V. Keyser with a dangerous weapon, that is, a pistol.

FIFTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Mabel E. Swaim, property of Peoples Drug Stores, Incorporated, a body corporate, of the value of about \$2.15, consisting of \$2.15 in money.

SIXTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Mabel E. Swaim with a dangerous weapon, that is, a pistol.

SEVENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Martha Uzzell, property of Peoples Drug Stores, Incorporated, a body corporate, of the value of about \$37.14, consisting of \$37.14 in money.

EIGHTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Martha Uzzell with a dangerous weapon, that is, a pistol.

NINTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Richard B. Coughlin, property of Peoples Drug Stores, Incorporated, a body corporate, of the value of about \$87.42, consisting of \$87.42 in money.

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TENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Richard B. Coughlin with a dangerous weapon, that is, a pistol.

ELEVENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Benoni Abbo-Offei, property of Benoni Abbo-Offei, of the value of about \$2.00, consisting of one key case of the value of \$2.00.

TWELFTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Benoni Abbo-Offei with a dangerous weapon, that is, a pistol.

THIRTEENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Edward W. Carson with a dangerous weapon, that is, a pistol.

FOURTEENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow assaulted Theodore Rainsford with a dangerous weapon, that is, a pistol.

FIFTEENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, feloniously did take, use, operate and remove, one certain automobile, property of Celia B. Dail, from a certain street, and did operate and drive said automobile, for their own profit, use and purpose, without the consent of Celia B. Dail, the owner of said automobile.

SIXTEENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, without justifiable and

excusable cause, did assault Charles H. Cook, with a deadly and dangerous weapon, that is, a pistol, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Charles H. Cook was engaged in the performance of his official duties.

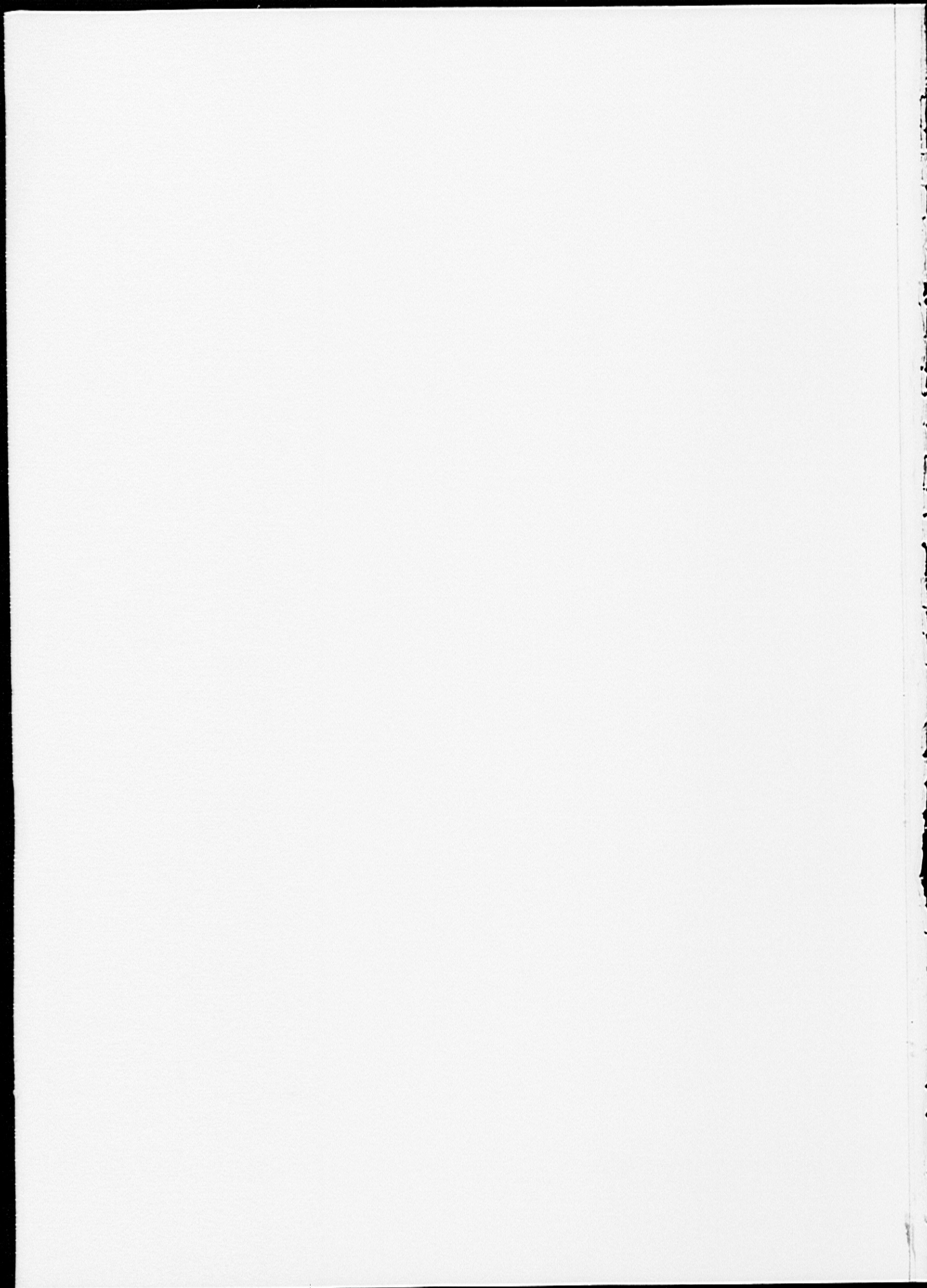
SEVENTEENTH COUNT:

On or about November 30, 1967, within the District of Columbia, Charles Robinson did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

David C. T. [illegible]
Attorney of the United States in
and for the District of Columbia

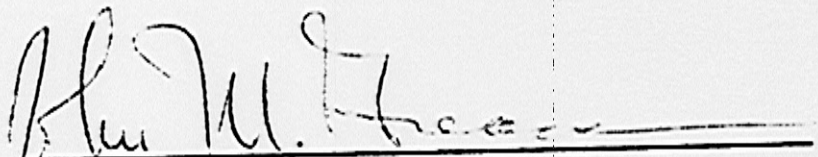
A TRUE BILL: *Edward N. Fink*

Foreman



CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Reply Brief for Appellant to be served by mailing a copy thereof, postage prepaid, to John A. Terry, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, N. W., Washington, D. C. 20001, to Julius R. Schlezinger and Mario Escudero, 1140 Connecticut Avenue, N. W., Washington, D. C. 20036, counsel for appellant Wilson in No. 22721, and to John J. Dempsey, 815 15th Street, N. W., Washington, D. C. 20005, counsel for appellant Maurice Winslow in No. 22944, this 2nd day of October, 1969.



John M. Greacen